COMMITTEE FOR IDAHO'S HIGH DESERT

IBLA 81-741 Decided March 22, 1982

Appeal from decision of Idaho State Director, Bureau of Land Management, denying protest against exclusion of certain areas as wilderness study areas. Units 57-4 through 57-8 and 62-2.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

   A BLM decision to eliminate an inventory unit from further consideration as a wilderness study area, pursuant to sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1976), will be set aside and the case remanded to BLM only where on appeal the appellant raises substantial questions concerning the adequacy of BLM's consideration of whether the unit has the requisite outstanding opportunity for solitude or a primitive and unconfined type of recreation and the record does not adequately support BLM's conclusion on that criterion.

2. Federal Land Policy and Management Act of 1976: Wilderness-Wilderness Act

   Where an appellant disagrees with the decision below and seeks to have his judgment substituted for that of the decisionmaker, his appeal will be carefully considered, with due regard for the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal.

APPEARANCES: Bruce R. Boccard, Boise, Idaho, for appellant; Barbara Berschler, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

The Committee for Idaho's High Desert (CIHD) 1/ has appealed the February 13, 1981, decision of the Idaho State Director, Bureau of Land Management (BLM), denying its protest against the total exclusion of units 57-4 through 57-7 and 62-2, and the partial exclusion of unit 57-8, in the Shoshone District, as wilderness study areas (WSA's) under section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1976), after BLM made a final intensive inventory of these and other units in response to various protests. See 46 FR 12338 (Feb. 13, 1981).

Under section 603(a), the Secretary is required to review those roadless areas of 5,000 acres or more which were identified during the inventory required by section 201(a) of FLPMA, 43 U.S.C. § 1711(a) (1976), as having the wilderness characteristics described in the Wilderness Act of September 3, 1964, 16 U.S.C. § 1131 (1976). Thereafter, the Secretary is to report to the President his recommendation as to the suitability or nonsuitability of each such area for preservation as wilderness, and the Congress will make the final decision with respect to wilderness designations after receiving recommendations from the President. 43 U.S.C. § 1782(b) (1976).

The wilderness characteristics referred to in section 603(a) of FLPMA are set forth in section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976), as follows:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

1/ CIHD's appeal is joined in by the Idaho Conservation League, Idaho Environmental Council, Boise State University Conservation Group, Sierra Club (as to Unit 62-2 only), and Wilderness Society.

The wilderness identification and review undertaken by the State Office has been divided into three phases by BLM: Inventory, study, and reporting. The State Director's decision of February 13, 1981, marks the end of the inventory phase of the review process and the beginning of the study phase.

CIHD has submitted an extensive statement of reasons for appeal, including some 50 labeled photographs, 16 affidavits, various appendices, and a large-scale topographic map of the areas in question. Because of the specificity of the appellant's allegations, it is necessary to discuss each of the units individually. 2/

Unit 57-4, Black Ridge Crater: According to BLM, this 8,138-acre unit was rejected because it was split by three roads into three separate parcels, none of which then met the 5,000-acre minimum size criterion. However, appellant argues that one of these roads does not meet the criteria for defining a road set forth in Organic Act Directive 78-61, the Wilderness Inventory Handbook (WIH), and that the State Director's decision is therefore in error and should be reversed. Appellant makes other arguments as well, but they are irrelevant unless the statutory size criterion has been met.

We agree that it has not been. Once BLM has determined that a particular access route meets the WIH criteria for a road -- that is, that it has been improved and maintained by mechanical means to insure relatively regular and continuous use (WIH at 16) -- considerable deference must be paid to BLM's determination, and appellant has a heavy burden of proof to overturn it. Richard J. Leaumont, 54 IBLA 242, 88 I.D. 490 (1981). In this case, since BLM not only conducted extensive on-the-site evaluations prior to its initial recommendations, but also conducted an intensive inventory subsequent to appellant's original protest, credence must be given to its finding unless that finding is clearly erroneous. Such is not the case here. Appellant simply argues that it would reach a different conclusion, submitting two photographs in support of its arguments. This evidence is insufficient to find BLM's conclusion to be in error as a matter of law, so BLM's decision must be affirmed.

Unit 57-5, Lone Rock: Again, appellant and BLM are in disagreement on whether this 10,934-acre parcel sufficiently meets the WIH criteria for naturalness and on whether it offers an outstanding opportunity for solitude or for a primitive and unconfined type of recreation. BLM bases its negative conclusions in large part upon the fact that two access routes (which it deleted because they are major imprints of man on the naturalness of the unit) split the unit into three parcels, none of which meets the 5,000-acre size criterion of section 603(a). In its February 13, 1981, letter responding to appellant's protests, however, BLM admits that the two access routes do not affect the entire unit.

2/ It may be noted that both the appellant and the Solicitor requested extensions of time to file a statement of reasons or an answer in this case, and that the appellant has strenuously objected to the Solicitor's last of several such requests. However, the granting of such extensions is entirely within the discretion of the Board (43 CFR 4.22(f)), so to the extent that appellant's objection constitutes a motion for relief, it is hereby denied.

Appellant argues that it can find no justification in BLM regulations for subdividing units on the basis of ways which do not meet the road definition; that BLM regulations state that boundary adjustments shall be made only in exceptional circumstances and must not compromise the integrity of the wilderness characteristics of the unit (citing OAD 78-61, Change 2, at 8). Statement of Reasons (SOR) at 16. We agree with appellant that BLM does not appear to have followed its own criteria in this matter. However, appellant's burden is not merely to show that BLM's procedures were faulty, but that its conclusions were wrong. Sierra Club, 61 IBLA 329 (1982). On the basis of flat terrain, lack of vegetation, and absence of scenic features, BLM has concluded that outstanding opportunities for solitude and recreation are lacking, and appellant has supplied no compelling proof that BLM's conclusion would be different if the unit were larger. Therefore, BLM's decision must be affirmed.

Unit 57-6, Wildhorse: This 21,544-acre unit was reduced to 14,677 acres during BLM's intensive inventory because certain lands cut off by a road (2,812 acres), or found to contain imprints of man (4,055 acres), were deleted. BLM finds the remaining parcel to be natural, to meet size requirements, and to have supplemental values, but not to offer outstanding opportunities for solitude or for a primitive and unconfined type of recreation. BLM's February 13 letter admits the presence of rock monuments but states that their sightseeing value was not considered outstanding. The primary basis for BLM's finding again seems to be that it considers the unit to contain an inadequate amount of topographical and vegetative screening to afford an opportunity for solitude, and that it also considers the unit's flat topography with very little vegetative variation to create a dull landscape with few scenic qualities or recreational opportunities (Intensive Inventory at 4).

Appellant argues that BLM incorrectly assessed the topographic screening that exists in the unit, and that it therefore failed to recognize the outstanding opportunities for solitude which exist (SOR at 13). Similarly, appellant argues, BLM failed to recognize the unit's outstanding opportunities for hunting and nature study, in addition to the opportunities for hiking and horseback riding that BLM noted. Thus, there is a diversity of recreation opportunities, and the unit meets the criteria of the WIH at page 14. Appellant also cites OAD 78-61, Change 2, page 7, to the effect that absence of supplemental values (e.g., low scenic quality) is not a permissible basis for concluding that an area lacks wilderness characteristics.

The five photographs of hilly and rocky terrain that appellant has submitted in support of its contentions were all taken in a part of the unit (T. 5 S., R. 19 E., sec. 12) that BLM excluded because of an access route that "shows evidence of mechanical improvement" but "cannot be defined as a road" (Intensive Inventory Summary). However, the Intensive Inventory itself (at 1) says that the 2,812 acres involved were excluded "because they are cut off by a road W-7." Despite this inconsistency, BLM's decision makes clear that it has found that there is insufficient topographical or vegetative screening to provide an opportunity for solitude, and that the same lack of scenic features limit the opportunities for recreation. Appellant alleges, but has not proved, that both opportunities are outstanding. In the absence of such proof, we must affirm BLM's finding.

Unit 57-7, Pagari: This unit, which is similar in many ways to unit 57-6, was also reduced (from 39,169 acres to 26,078 acres) during the intensive inventory. In addition, the acreage immediately surrounding the two bisecting access routes was deleted, so that the unit is now split into three parcels, each consisting of more than 5,000 acres. BLM finds the unit to be natural in character but lacking in opportunities for solitude (both because of its breakdown into three smaller parcels and because it is uniformly flat with little vegetative screening) or for primitive and unconfined recreation. As to the latter, BLM recognizes the opportunities for activities such as desert hiking, camping, photography, and nature study, but does not consider them outstanding. Under supplemental values, BLM notes that burrowing owls nest within the unit, that cairns found throughout the unit could have historical significance, and that old and weathered lava formations provide opportunities for geologic and biological studies of succession of lava flows. As to the two bisecting access routes, BLM says that one (W-2) is a road, that the other (W-7) cannot be defined as a road (presumably because it shows "little evidence of use"), and that the entire route shows evidence of mechanical construction, which constitutes a noticeable imprint on the apparent naturalness of the unit (Intensive Inventory at 4).

Appellant argues (identifying it by section numbers) that route W-2 is not a major imprint on the unit, and that it is really a low-grade track which cannot be seen from more than 50 feet away. In so arguing, however, appellant mistakenly confuses route W-8 as part of route W-2, and it is not clear whether this confusion is because the latter route is virtually unnoticeable or because appellant began its survey in the wrong section of the unit. As to solitude, however, appellant points out that even BLM's April 1980 proposed decision description said, "The unit is relatively flat grassland terrain, with increasing topographical relief in interior portions. Old and new lava formations add variety to the landscape" (SOR at 10; emphasis in original). Thus, appellant argues, BLM even contradicts itself as to the "uniformly flat" character of the unit. Appellant also cites its topographic map, which shows that although the altitude of the unit is generally in the 4,400- to 4,500-foot range, portions of it vary from under 4,400 feet to over 4,900 feet, a considerable variation for desert terrain. Appellant also considers the hunting opportunities in this unit to be outstanding.

Although appellant's arguments are not without merit, the same arguments were made to BLM during the course of its intensive inventory, and BLM's ultimate finding was negative, partly because of the roads that it found bisected the unit. As we have said before, it is not the function of this Board to second-guess decisions made by BLM on the basis of personal study and observation. BLM's minor inconsistency in describing the unit's terrain, during the two parts of the inventory phase, is not sufficient to vitiate its conclusion that the unit lacks outstanding opportunities for solitude and for recreation. We cannot substitute our judgment for BLM's in this matter.

Unit 57-8, Sand Butte: Unlike the other units being appealed, which were rejected as WSA's by BLM as a result of its intensive inventory, 20,792 acres of this unit (out of 36,745 original acres) were retained by BLM as a WSA. CIHD has appealed BLM's decision to drop two of the five parcels that were eliminated, identified as parcels 8 and 9 in the intensive inventory. BLM's reason for rejecting parcel 8 (containing 1,751 acres) is that

it contains four mechanically constructed access routes; and its reason for rejecting parcel 9 (containing 5,900 acres) is that it was judged not to offer outstanding opportunities for solitude or primitive recreation.

The four access routes in parcel 8 (W-8, W-9, W-10, and W-11) are each described by BLM in the following language: "Although it cannot be defined as a road, the mechanical construction along this route is a noticeable imprint on the apparent naturalness of the unit" (citing aerial photographs). Intensive Inventory at 6. Appellant says that, in fact, these imprints are not roads, but firebreaks; that they are permitted in wilderness areas by the WIH (at 12); and that, despite the evidence of the aerial photos, they are in fact very difficult to detect on the ground.

As to parcel 9, which was formed when another part of the unit was excluded because of bisecting access routes, it must again be noted that the particular access route (W-6) that cuts off parcel 9 from the main portion of the unit is not defined as a road; and appellant again argues that from the ground it is substantially unnoticeable.

Much of the confusion engendered in this appeal might have been avoided if BLM had observed the guidance set forth in OAD 78-51, Change 2, which states (at 3): "b. Roads. The word 'road' should only be used to identify a route of travel which meets the Wilderness Inventory Handbook definition of a road. Other routes of travel should be referred to as 'ways' or 'trails'; the term 'roadways' should not be used."

Using the term "access routes" is not much different from using the term "roadways," particularly if the latter term in fact includes firebreaks, which are permitted within a WSA. (Several of the "access routes" referred to by BLM are simply labeled "jeep trails" on the USGS topographical map supplied by appellant.)

However, BLM's finding with respect to the four access routes of parcel 8 is not that they are roads, but that they are noticeable imprints on the apparent naturalness of the unit. Similarly, its finding with respect to parcel 9 is that it does not offer outstanding opportunities for solitude or recreation. Those findings, although challenged by appellant, who concludes otherwise, have not been overcome by a preponderance of evidence, much less by the showing of compelling reasons required here. Thus, BLM's decision must be affirmed. Richard J. Leaumont, supra.

Unit 62-2, Confluence: This unit, which originally consisted of 5,110 acres adjacent to a scenic river, was omitted from WSA consideration because a powerline was overlooked, and when it was deleted (affecting 533 acres), the remaining 4,577 acres failed to meet the minimum size criterion of section 603(a). BLM's intensive inventory describes this unit as an "excellent example of wilderness." However, BLM's February 13, 1981, letter points out that the unit is not adjacent to the proposed Mountain Sheep Wilderness, as originally thought, so it could not be identified as a WSA in the final inventory.

CIHD appeals on the basis of statements in the WIH (at 12) that areas of less than 5,000 acres can be identified as wilderness areas if the public has indicated strong support for study of a particular area and if it is

suitable for wilderness management. However, this Board has held that only roadless areas of 5,000 acres or more are provided for under section 603(a) of FLPMA, noting that BLM may have other authority for preserving the wilderness characteristics of such areas. See Tri-County Cattlemen's Association, 60 IBLA 305 (1981). Thus, BLM's decision with respect to this unit must be sustained.

[1] In summary, as we said in Richard J. Leaumont, supra, the evaluations made by BLM as to the wilderness values of inventoried areas

> are necessarily subjective and judgmental. BLM's efforts are guided by established procedures and criteria, and are conducted by teams of experienced personnel who are often specialists in their respective areas of inquiry. Their findings are subjected to higher-level review before they are approved and adopted. Considerable deference must be accorded the conclusions reached by such a process, notwithstanding that such conclusions might reach a result over which reasonable men could differ * * *.

(54 IBLA at 245). Where an appellant disagrees with the decision below and seeks to have his judgment substituted for that of the decisionmaker, his appeal will be carefully considered. However, where responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal. 54 IBLA at 246, quoting from Rosita Trujillo, 21 IBLA 289, 291 (1975).

[2] Nothing in this case overcomes the foregoing principle. A BLM decision to eliminate an inventory unit from further consideration as a WSA, pursuant to sec. 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1976), will be set aside and the case remanded to BLM only where on appeal the appellant raises substantial questions concerning the adequacy of BLM's consideration of whether the unit has the requisite outstanding opportunity for solitude or a primitive and unconfined type of recreation and the record does not adequately support BLM's conclusion on that criterion. Here, the evidence provided by appellant is insufficient to overturn BLM's record.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of BLM is affirmed.

Bernard V. Parrette
Chief Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

BLM's decision concerning these units deserves to be affirmed. As noted in the opinion, BLM found that the units particularly 57-6, Wildhorse, and 57-7, Pagari, failed to offer outstanding opportunities for solitude or for primitive and unconfined recreation, that they contained inadequate topographical and vegetative screening, that the flat topography with little vegetative variation resulted in a dull landscape with few scenic qualities.

My review of the record, including appellant's photographs, suggests that BLM has understated the lack of wilderness values present in these units. Except that every tract of land is to some extent unique, and thus distinguishable from every other tract, this land appears to have no characteristics which would significantly distinguish it from thousands of square miles of other sage-covered plains in Idaho, Utah, Oregon, Montana, Wyoming, and Nevada. In order to attribute "outstanding" opportunities, values, or characteristics to land, that land must be compared with other lands, as the term "outstanding" is necessarily comparative in its concept. BLM correctly perceived that these units offer nothing "outstanding" in any particular.

I wish also to comment on the import and effect of Organic Act Directive (OAD) 78-61, Change 3, which states, "[I]t is erroneous to assume that simply because a unit or portion of a unit is flat and/or unvegetated, it automatically lacks an outstanding opportunity for solitude." (Emphasis added.) There is nothing compelling in this admonition, and I find nothing in the record to suggest that BLM assumed that these units automatically lacked outstanding opportunity for solitude simply because of the terrain. Moreover, it would be absurd to lend such significance to the above-quoted sentence from OAD as to require that BLM automatically regard every tract of requisite size as affording "an outstanding opportunity for solitude" regardless of terrain and vegetation. Everyone of common sense must acknowledge that relatively flat terrain and sparse vegetation are factors which diminish the opportunities for solitude. While in every case those factors might not determine the classification, in certain cases they very well might. It is a matter of the application of subjective judgment on a case-by-case basis.

Anyone can experience solitude anywhere if no one else happens to be in the vicinity. The test of solitude in these kinds of classifications, then, is not whether it is possible to experience solitude when the user is alone on the unit, but what opportunity for solitude can be experienced by different individuals or parties when they are on the unit at the same time. In these units, both BLM and appellant identify horseback riding, hunting, and hiking as prominent recreational activities. It is obvious to me that several parties of horsemen, hunters, or hikers on these units would be frequently, if not almost constantly, in visual or audible contact.

It is the mission of BLM in the inventory phase to designate only those units as wilderness study areas (WSAs) that stand a chance of eventual incorporation into the permanent wilderness system. To include units in WSAs

that have absolutely no chance of permanent designation is not only an exercise in futility, but a waste of public resources. If virtually all areas of requisite size are to be designated WSAs regardless of how lacking they may be in other wilderness attributes, then the "Inventory Phase" is a sham and a charade, a virtual function without purpose.

Edward W. Stuebing
Administrative Judge